Supreme Court, U.S.
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No. 89-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LARRY GENE KLEASNER,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in child sex molestation prosecution admission of expert testimony to rehabilitate the complaining witness by identifying inconsistent testimony as a benchmark of the so-called child sex abuse accommodation syndrome violated petitioner's Sixth Amendment right to cross-examination and counsel and Fifth and Fourteenth Amendment rights to due process.

2. Whether the court's exclusion of defense expert testimony that petitioner had no predisposition to molest children due to absence in him of any sexual pathology deprived him of vital defense evidence in violation of his Fifth, Sixth and Fourteenth Amendment rights to due process in presenting a defense.

3. Whether the California Supreme Court's dismissal of petitioner's review while simultaneously reversing a conviction in another case on identical grounds, exclusion of defense expert testimony that defendant had no predisposition to molest children due to absence of sexual pathology, violated petitioner's right to due process under the Fifth and Fourteenth Amendments.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

LARRY GENE KLEASNER,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Larry Gene Kleasner, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeal of California, Fourth Appellate District, Division Two, affirming his conviction on four counts of child molestation with proceedings suspended on terms of five years probation, including six months incarceration.

JUDGMENT AND OPINION BELOW

The order of the Court of Appeal of California, Fourth District, Division Two, No. E004375 (not to be published), is set out as Appendix A.

JURISDICTIONAL STATEMENT

On May 5, 1989, the Court of Appeal of California, Fourth Appellate District, Division Two, filed its opinion and order affirming conviction. (App. A) Defendant's timely Petition for Review to the Supreme Court of California was granted on August 10, 1989, (App. B) but, then without opinion, dismissed pursuant to California Rules of Court, Rule 29.4(c), as improvidently granted in the first instance on March 15, 1990. (App. C)

This petition to review the judgment of a state court of last resort is timely filed within ninety days after denial, order of dismissal of petition for review after granting same on grounds it was improvidently granted in the first instance.

Jurisdiction is invoked under 28 U.S.C. Section 1257(a), and Rule 10 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be . . .; nor be deprived of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATUTORY PROVISIONS INVOLVED

Section 352, California Evidence Code provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Section 402, California Evidence Code provides in pertinent part:

> ". . . (b) The Court may hear and determine the questions of the admissibility of evidence out of the presence of hearing of the jury . . ."

Section 1102, California Evidence Code provides in pertinent part:

> "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: (a) Offered by the defendant to prove his conduct in

conformity with such character or trait of character . . ."

California Rules of Court, Rule 29.4(c) provides:

> "The Supreme Court may dismiss review of a cause as improvidently granted and remand the cause to the Court of Appeal. The order of dismissal and remand shall be sent by the clerk to all parties and to the Court of Appeal. On filing of the order in the Court of Appeal, the decision of the Court of Appeal shall become final and the clerk of the Court of Appeal shall issue a remittitur forthwith."

STATEMENT OF THE CASE

NATURE OF THE CASE

Petitioner was found guilty of four counts of lewd and lascivious conduct with a child of under fourteen years of age after a jury trial, California Penal Code, Section 288 subd. (a), and sentenced to proceedings suspended on condition he be placed on probation for five years, including he register as a sex offender and be incarcerated in Riverside County jail for six months. His conviction and sentence were affirmed by the California Court of Appeal. (App. A) His Petition for Review to the Supreme Court of California was originally granted in August, 1989, pending disposition of a lead case. (App. B) However, on March 19, 1990, the California Supreme Court after reviewing a conviction in the presumably lead case on the same grounds, inexplicably dismissed Petitioner's Petition for Review as improvidently granted in the first instance and the appellate

court ruling affirming conviction became a final judgment. (App. C)

STATEMENT OF FACTS

In 1984 the complaining witness, Laloni A. would visit her stepmother, then residing with defendant on weekends. (Tr. 183-186, 188, 345-350)

The prosecutor presented no physical evidence and all of the incidents subject of the four counts of lewd and lascivious conduct were alleged to have taken place at the defendant's home with no third-party witnesses to the incidents. The only direct evidence of the alleged crimes was the testimony of Laloni A.

Laloni A. testified about five alleged incidents of child molestation and defendant was convicted of all but the first, which testimony is as follows:

1. Defendant ran his hands inside her tee shirt rubbing her breasts. (Tr. 191-194)

2. Defendant lifted her bathing suit top licking her breasts. (Tr. 194-196)

3. Immediately after incident number 2, defendant laid her on his bed and fondled her vagina under her bathing suit. (Tr. 196-198)

4. Defendant put her hand in his pants and made her rub his hard penis. (Tr. 198-199)

5. While laying on her stomach on the sofa bed, defendant fondled her around her vagina and then licked the finger of that hand. (Tr. 200-201)

Defendant testifying denied all allegations. (Tr. 595-599) Defendant presented character evidence from long-time associates in the California Highway Patrol, his daughter, his former wife, church and other friends.

Each described defendant as a church-going, family-oriented person who, in their opinion, would not molest a child. Defendant's former wife who had known him 21 or 22 years and his 15-year-old daughter who had been with him around children for years opined he would never molest a child. His daughter, who had seen him with the alleged victim, never saw him inappropriately touch a child. (Tr. 475-493, 500-502, 505-511, 514-518, 533-534, 558-561)

Defendant, who primarily relied upon cross-examination of the alleged victim and testimony of the investigating officers and Laloni's mother in his defense exposed many inconsistencies in the testimony and statements concerning the allegations on many of the following critical and material points.

Laloni A. (all incidents): Laloni admitted that at a Santa Ana pretrial administrative hearing, a hearing concerning defendant's continued employment with the California Highway Patrol in light of these charges, she testified nothing would happen if she lied as ". . . you wouldn't know I was lying" and when asked, said she still felt the same. (Tr. 262) She stated the incidents were not a burden to her; didn't know or remember if in 1984 she felt it was wrong for a man to touch her like that; didn't think about the incidents when they occurred. (Tr. 207-208) The Santa Ana administrative hearing testimony of Laloni was read to the jury wherein she stated she told her mother about it because it's been a burden on her ever since it happened and thought about it every day since. (Tr. 668-669)

Incidents 1 through 3 re: Laloni A.: Laloni testified she couldn't remember telling her mother defendant touched her on the outer parts of her clothing. (Tr. 215-216) Laloni's mother said Laloni told her defendant

only touched her on the outside of her clothing. (Tr. 351)

Incident 1 re: Laloni A.: With respect to incident 1, she did not tell the investigating detective that defendant rubbed her breasts. (Tr. 396-400, 404)

Incident 2 re: Laloni A.: Laloni's mother said Laloni said defendant only touched her outer clothing. (Tr. 351, 357)

Incident 3 re: Laloni A.: Laloni never told her mother defendant took off her bikini bottom. (Tr. 357) Laloni on cross-examination admitted she couldn't remember if defendant pulled her bikini bottom from her waist at all. (Tr. 223, 249-251) In two lengthy interviews with the investigating officer she didn't report defendant pulled her bathing suit bottom either to her knees or off her bottom. Santa Ana hearing testimony was read to the jury to the effect that defendant laid her on the bed, pulled her bikini bottom towards her knees and was fondling her with his fingers in her vagina. (Tr. 396-400, 403)

Incident 4 re: Laloni A.: Laloni didn't think she told her mother defendant placed her hand in his shorts. (Tr. 216) She never told that to the investigating detective in two lengthy interviews either. (Tr. 396-403)

Laloni's Santa Ana testimony was read to the effect that she didn't remember defendant had underwear under his shorts, but in cross-examination she testified defendant had shorts with no zipper and underwear underneath. (Tr. 231-233)

Incident 5 re: Laloni A.: Laloni never told her mother of the sofa bed incident. (Tr. 357) When asked, she couldn't remember if she told her mother of the alleged sofa bed incident. (Tr. 216) She told the investigating officer she was fully clothed in that incident and

laying face down. (Tr. 432-434) She never told him in two lengthy interviews that defendant put his finger in his mouth and licked it. (Tr. 396-400, 402)

Dr. Craig Rath, a licensed clinical psychologist, with experience in child sex abuse cases as a forensic psychologist, and who had evaluated several hundred people in "288 type cases" to determine eligibility for probation as well as treating child abuse victims for Parents United and who had done a study on how people remember what they see testified for the prosecution. (Tr. 280-284) Over objection, Dr. Rath testified that ten year old white female children, as a class, tend not to tell about nonviolent, nonpainful child abuse if a child has been raised with a strict conscience and if the conduct has been labeled clearly wrong until something else intervenes such as a television program. (Tr. 285-289) He stated that children are incapable of retelling events with the same accuracy as adults because their vocabulary is less complete and they tend to suppress traumatic events and tend to fill in the blanks with the best guess possible, without awareness of their doing it. (Tr. 296-300) Also, the closer you get to the number seven in the number of events, seven plus two or minus two, the more confused the child will get and the lower the number of events, the less likely the confusion. (Tr. 302) He further testified as a prosecution rebuttal witness with respect to the character testimony presented by defendant that factors such as how often people go to church and what the typical lay person or character witness would look to to determine the type of personality dynamic required for a person to be a child molester are not valid factors and that doctors can evaluate child molesters and look for certain things that correlate with that type of personality. (Tr. 693-965)

Defense counsel's objection to Craig Rath's testimony and concern that the testimony was getting into specific facts was overruled. (Tr. 288) Dr. Rath's above testimony paralleled specific testimony concerning Laloni and the specific allegations in that Laloni was a ten year old white female at the time of the incidents who revealed her secret to her mother's suspicious questioning after watching a television program, "Don't Touch," who alleged five incidents of child molest, the number seven minus two, all of which incidents were nonviolent and nonpainful who, in relevation, told her mother she had done something wrong and seemed particularly concerned that "it felt good." (Tr. 27-36, 202, 341, 384-385)

A defense Section 402 Evidence Code motion to admit the expert medical-psychiatric testimony of Dr. Seawright Anderson on an offer of proof that he would testify that, in his expert opinion, defendant is not suffering from a mental disease, defect, or disorder that might predispose him to commit sexual acts with children, that defendant does not appear to suffer from a mental defect, disease or disorder commonly known as pedophilia, for the purpose of offering evidence to show defendant does not have that mental disease, defect or disorder and, therefore, under *People v. Jones* (1954) 42 Cal.2d 219 [266 P.2d 38], the jury might reason that he probably more likely than not did not commit these offenses, was denied. (Tr. 20, 26-27, 322-331, 467-473) Doctor Anderson was represented as a board certified psychiatrist and neurologist who had qualified as an expert in both superior and municipal courts in California relating to questions of whether or not persons have mental diseases, defects or disorders which might predispose them to committing acts of sexual misconduct with children. (Tr. 467-468)

The issue of the denial of admission of Doctor Anderson's above-proffered testimony which the defense offered under *People v. Jones* (1954) 42 Cal.2d 219 [266 P.2d 38] was the cornerstone of defendant's appeal to the California Appellate Court (App. D) and, subsequently, upon Petition for Review to the California Supreme Court. (App. E) The California Supreme Court granted defendant review in August, 1989, with reference to a lead case (App. B), presumably *People v. Stoll* (1989) 49 Cal.3d 1136 [265 Cal.Rptr. 111, 783 P.2d 698], decided in December, 1989. In *Stoll* the California Supreme Court reversed child molest convictions under California Penal Code, Section 288, because the trial court had erroneously failed to follow its ruling in *People v. Jones, supra,* (1954) 42 Cal.2d 219 [266 P.2d 38] by denying admission of defense expert testimony that defendant showed no signs of "pathology" in the nature of "sexual deviation" as "character evidence" in a Penal Code, Section 288, prosecution because it tended to show defendant had no predisposition to commit lewd or incestuous acts, *People v. Stoll, supra,* (1989) 49 Cal.3d 1136 [265 Cal.Rptr. 111 at pp. 116, 117, 783 P.2d 698]; Petitioner's identical point on appeal.

Petitioner's case was pending review by the California Supreme Court, review having been granted in August, 1989, presumably pending the *Stoll* decision when the *Stoll* decision was issued in December, 1989. Inexplicably, defendant's Petition for Review was dismissed approximately four months later in March, 1990, without opinion as improvidently granted rendering the appellate court's judgment affirming defendant's conviction final.

RAISING THE FEDERAL QUESTION BELOW

At all times below before the California Court of Appeal and the Supreme Court of California, Petitioner challenged the prejudice to his constitutional rights under the Fifth and Sixth Amendments to due process, a fair trial, right to cross-examination and effective counsel. (U.S. Constitution, amend. V, VI and XIV)

I

IN CHILD SEX MOLESTATION PROSECUTION ADMISSION OF EXPERT TESTIMONY TO REHABILITATE THE COMPLAINING WITNESS BY IDENTIFYING INCONSISTENT TESTIMONY AS A BENCHMARK OF THE SO-CALLED CHILD SEX ABUSE ACCOMMODATION SYNDROME VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION AND COUNSEL AND FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS.

The People cited authority for the proposition that psychological testimony in support of credibility is admissible. *People v. Bledsoe* (1984) 36 Cal.3d 236 [203 Cal.Rptr. 450, 681 P.2d 291]; *People v. Roscoe* (1985) 168 Cal.App.3d 1093 [215 Cal.Rptr. 45]. The *Bledsoe* and *Roscoe* decisions support admissibility of Child Sex Abuse Accommodation Syndrome, hereinafter "CSAAS," testimony as a method of rehabilitating a complaining witness in a child molest case. The admissibility of such testimony has been upheld in more recent California cases as well. *People v. Sanchez*

(1989) 208 Cal.App.3d 721 [256 Cal.Rptr. 446]; *People v. Stark* (1989) 213 Cal.App.3d 107 [261 Cal.Rptr. 479]. Both cases limit the testimony to rehabilitate the victim's testimony as it relates to delay in reporting the incident and with respect to inconsistent testimony.

Petitioner contends herein that in a close case such as this, entirely turning upon the jury's determination of credibility, complaining child witness' version of events versus defendant's denials, allowing a People's expert to bolster the credibility of a complaining witness who has otherwise been so extremely inconsistent in her various versions of the facts is to lend an aura of scientific authenticity to allegations the jury might well, otherwise, consider false. This ruling allowed the rehabilitation of Laloni A. who admitted that she had said under oath, "How would you know if I lied?"

Petitioner contends that to allow such testimony to be admitted essentially eliminates a defendant's due process rights to effective counsel and meaningful cross-examination under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that such testimony leads the jury to believe that the more inconsistencies there are in a child-victim's testimony, the more apt it is to be true. Ultimately, defendant's attorneys would have to conclude that cross-examination of witnesses is harmful since vigorous cross-examination which elicits major inconsistencies may be wholly detrimental to the defendant if such inconsistencies only serve to convince the jury not of the unreliability but of the truth and accuracy of the victim's molestation charges against defendant.

Without cross-examination, the defendant has lost his primary defense tool, without such there will be no due process, no fair trial and only a severely limited right to counsel. United States Constitution, Fifth, Sixth and

Fourteenth Amendments; *Gideon v. Wainwright* (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792]; *People v. Pope* (1979) 23 Cal.3d 412 [152 Cal.Rptr. 732, 590 P.2d 859]; *Faretta v. California* (1975) 422 U.S. 249 [26 L.Ed.2d 489, 90 S.Ct. 1930]. Said rights under such circumstances are paid lip service only and are illusory at best.

Petitioner contends allowing the CSAAS testimony denied defendant's Sixth Amendment right to confront witnesses against him. The broad scope of the CSAAS testimony allowed at the trial had a chilling effect on the defendant's right to counsel's cross-examination of the purported victim, emasculating counsel's otherwise very effective cross-examination. Moreover, the CSAAS testimony allowed at trial specific to this victim, as opposed to CSAAS testimony as to the class as a whole, constituted further prejudice to defendant's Fifth and Sixth Amendment rights.

The California cases allowing rehabilitation of the complaining witness in child molest cases through expert testimony explaining delays in reporting and inconsistent testimony as part of CSAAS limit the expert testimony to victims as a class and, so as to avoid substantial danger of undue prejudice, not to a victim in particular and not to relate it to details of the case at hand. *People v. Roscoe* (1985) 168 Cal.App.3d 1093 [215 Cal.Rptr. 45]; *People v. Gray* (1986) 187 Cal.App.3d 213 [231 Cal.Rptr. 658]; *People v. Stark* (1989) 213 Cal.App.3d 107 [261 Cal.Rptr. 479].

Petitioner does not think Dr. Rath's specific testimony purportedly about child molest victims as a group paralleled by sheer coincidence the facts in Laloni's case that she happened to be a ten year old white female who revealed her secret to her mother after watching a television program and that there were five incidents, seven

minus two counts, making up the crimes charged against defendant, all of which involve nonviolent and nonpainful incidents and who, in said revelation, told her mother that she had done something wrong and seemed particularly concerned that, "it felt good." (Tr. 27-36, 202, 285-289, 341, 384-385) Whether deliberately tailored to dovetail with Laloni's case or not, those parallel facts seem sufficient to classify Dr. Rath's testimony as directly related to Laloni's case and not properly limited to children as a class.

The admission of such testimony was so prejudicial that it outweighed any probative value. Said admission, even if such rehabilitative expert testimony is not held violative of due process rights to cross-examination and effective counsel, is so under the circumstances and deprived defendant of a fair trial.

Under relevant decisions of this Court the Sixth Amendment right to confront witnesses is incorporated to the states via the Fourteenth Amendment to the United States Constitution. *Davis v. Alaska* (1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347]; *Robert v. Russell* (1968) 392 U.S. 293 [88 S.Ct. 1921, 20 L.Ed.2d 1100], *rehearing denied*, 393 U.S. 899 [89 S.Ct. 73, 21 L.Ed.2d 191]; *Smith v. Illinois* (1968) 390 U.S. 129 [88 S.Ct. 748, 19 L.Ed.2d 956]; and *Pointer v. State of Texas* (1965) 380 U.S. 400 [85 S.Ct. 1065, 13 L.Ed.2d 923].

The right to confront witnesses is a fundamental right essential to a fair criminal trial. *Barber v. Page* (1968) 390 U.S. 719 [88 S.Ct. 1318, 20 L.Ed.2d 255], quoting from *Pointer v. State of Texas* (1965) 380 U.S. 400, 405 [85 S.Ct. 1065, 1068, 13 L.Ed.2d 923], the *Barber* court stated as follows:

> "There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous

> than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Id. at 721. *See also, Douglas v. State of Alabama* (1965) 380 U.S. 415 [85 S.Ct. 1074, 13 L.Ed.2d 934].

The Sixth Amendment right to confront witnesses means more than a right to physical confrontation. It means a right to cross-examine the witnesses. *Davis v. Alaska* (1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347]. The *Davis* court stated as follows:

> "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the witness physically. Our cases construing the [confrontation] hold that a primary interest secured by it is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418, (1965)."

Id. at 315.

It has been stated that the purpose of the Sixth Amendment right to confrontation is to augment accuracy in the fact finding process by insuring that the defendant has an effective means to test adverse

evidence. *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597]; *U.S. ex rel. Thomas v. Sielaff* (D.C. Ill. 1975) 404 F. Supp. 1037, *affirmed,* 539 F.2d 715; *Arias v. United States* (D.C. Cal. 1975) 404 F. Supp. 736.

Unlike other errors requiring a showing of prejudice to the defendant, denial of the right to effective cross-examination under the Sixth Amendment is a constitutional error which does not require any showing of prejudice. In fact, no amount of showing of want of prejudice can cure this constitutional error. *Smith v. Illinois* (1968) 390 U.S. 129 [88 S.Ct. 748, 19 L.Ed.2d 956]. *See also, Davis v. Alaska* (1974) 415 U.S. 308 at p. 318 [94 S.Ct. 1105, 39 L.Ed.2d 347], wherein the court stated as follows:

> "Petitioner was . . . denied the rights of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " Citing *Smith v. Illinois, supra,* and *Brookhart v. Janis* (1966) 384 U.S. 1, 3 [86 S.Ct. 1245, 1246, 16 L.Ed.2d 314].

It does not necessarily take a complete denial of the right to cross-examine to invoke the protection of the Sixth Amendment guarantee. In *United States v. Jordan* (1972) 466 F.2d 99 at p. 101, the court held that the right to confront witnesses may be infringed by less than a complete refusal to allow cross-examination. In this regard, the *Jordan* court stated as follows:

> "Of course, the clearest violation of the Sixth Amendment guarantee of the right of confrontation is where the

> defense is not allowed to examine the prosecution witnesses at all. *Brookhart v. Janis* (1966) 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314. The Supreme Court has recognized, however, that a defendant's Sixth Amendment rights may also be violated by less than a complete denial of all cross-examination." *Alford v. United States* (1931) 282 U.S. 687 [51 S.Ct. 218, 75 L.Ed. 624]; *Smith v. Illinois* (1968) 390 U.S. 129 [88 S.Ct. 748, 19 L.Ed.2d 956].

In the case at bench, the improper admission of the CSAAS testimony results in a diminution of defendant's right to confront the witness against him. The basis premise of CSAAS is that the victim/witness has a natural tendency to delay the reporting of the events constituting the alleged criminal offense and/or to recant the testimony, and/or to testify inconsistently as to the facts constituting the offense as a result of the trauma suffered in the molestation. As the cases cited herein with respect to the syndrome indicate, the California courts have allowed such testimony on a limited basis only for rehabilitative purposes. The courts have also consistently noted that such testimony is impermissible when it is used to show the truth of the molestation. Ironically, the only defense in such a case is effective cross-examination showing the victim is being untruthful by exposing material inconsistencies in the victim's prior statements and testimony which inconsistencies also support the theory that the victim is suffering from CSAAS. It takes no great leap, in fact, a very small step, for the jury to logically conclude molestation must have occurred no matter what cautionary instruction it

may have been given to the effect such CSAAS testimony must not be used to conclude the molestation in fact occurred.

The use of CSAAS testimony creates a substantial quandry for defense counsel. On the one hand, he is duty bound to represent the interest of the accused by cross-examining the complaining child witness to establish inconsistencies in testimony to show the charges are not true. On the other hand, revealing inconsistencies and substantial delays in reporting vitiates their use to support the conclusion the child witness is being untruthful; defendant's only defense. The inevitable result is support for the prosecution's argument that the child is suffering from CSAAS and that the child must have, therefore been molested.

II

THE COURT'S EXCLUSION OF DEFENSE EXPERT TESTIMONY THAT DEFENDANT HAD NO PREDISPOSITION TO MOLEST CHILDREN DUE TO ABSENCE IN HIM OF ANY SEXUAL PATHOLOGY DEPRIVED HIM OF VITAL DEFENSE EVIDENCE IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS IN PRESENTING A DEFENSE.

The court's exclusion of psychiatric expert testimony to show defendant was not suffering from a mental defect, disease or disorder predisposing him to molest children was error under *People v. Jones* (1954) 42 Cal.2d 219 at pp. 224, 225 [226 P.2d 38].

The California Supreme Court's decision in *People v. Jones* (1954) 42 Cal.2d 219 [226 P.2d 38], held that the trial court's exclusion of medical/psychiatric expert testimony to show defendant was not suffering from a mental defect, disease or disorder predisposing him to molest children was error. The trial court and the Fourth District Court of Appeal herein declined to follow the *Jones* decision and instead relied upon *People v. John W.* (1986) 185 Cal.App.3d 801 [229 Cal.Rptr. 783], a First District Court of Appeal decision, to exclude defendant's expert's medical/psychiatric testimony that defendant was not suffering from such a mental defect, disease or disorder. This contravened the principle of Stare Decisis and threatened uniformity of decision. *People v. Scott* (1976) 16 Cal.3d 242 [128 Cal.Rptr. 39, 546 P.2d 327]. It appeared the Court of Appeal had exceeded its jurisdiction. *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280 [109 P.2d 942]. In *People v. John W., supra,* (1986) 185 Cal.App.3d 801 [229 Cal.Rptr. 783], the continued viability of the *Jones* decision was questioned in light of the repeal of the Mentally Disordered Sex Offender Statute, hereinafter "MDSO."

Furthermore, the Court of Appeal had also placed reliance on *People v. Bledsoe* (1984) 36 Cal.3d 236 [203 Cal.Rptr. 450, 681 P.2d 291] for the proposition that admission of evidence such as that offered by defendant herein, medical/psychiatric expert testimony that defendant was not suffering from a mental defect, disease or condition known as pedophilia, must be conditioned on a prior showing that the basis of said opinion and the expert meet the so-called California *Kelly-Frye* standards. Defendant contended this was a mistaken application of *Kelly-Frye* and that it raised important questions of law of first impression. Since the *Kelly-Frye* line of cases in California had not been decided prior to *Jones*,

it also obviously impacted the continuing viability of the *Jones* decision in the wake of *Kelly-Frye*. Resolution of this issue was therefore important to assure uniformity of decision in California as to the admissibility in child molest prosecutions of such evidence as was held admissible in *People v. Jones* (1954) 42 Cal.2d 219 [226 P.2d 38] and inadmissible herein.

The *Kelly-Frye* Rule basically tests the reliability of scientific techniques which are new to the judicial system. The Court of Appeal had applied the *Kelly-Frye* Rule to uphold the lower court's decision to exclude the medical/psychiatric testimony herein. The excluded testimony did not deal with, nor relate to, any new scientific technique but rather only with medical/psychiatric matters, and defendant contended, therefore, the *Kelly-Frye* Rule was inapplicable.

The Court of Appeal in relying on *People v. Bledsoe* (1984) 36 Cal.3d 236 [203 Cal.Rptr. 450, 681 P.2d 291] found that defendant offered Dr. Anderson's testimony herein in order to prove the alleged molestation did not occur and concluded that, just as *Bledsoe, supra,* (1984) 36 Cal.3d 236 [203 Cal.Rptr. 450, 681 P.2d 291] required rape trauma syndrome to be subject to *Kelly-Frye* standards before such testimony could be used to show a rape had occurred, Dr. Anderson's testimony was also subject to said standards to prove a child molest had not occurred. However, defendant had offered the proffered testimony as character evidence only to show he was not suffering from a mental condition, defect or disease predisposing him to molest children to allow the jury to conclude if they so desired that he was less likely to have committed the alleged child molest since he did not suffer from such condition, defect or disease. These were the exact reasons stated in *People v. Jones* (1954) 42 Cal.2d 219 [226 P.2d 38]. It appears, in not

following *Jones, supra,* (1954) 42 Cal.2d 219 [226 P.2d 38] and relying on *Bledsoe, supra,* (1984) 36 Cal.3d 236 [203 Cal.Rptr. 450, 681 P.2d 291], the appellate court had exceeded its jurisdiction.

The California Supreme Court granted defendant herein review but ordered no briefs yet be filed pending a leading case (App. B), presumably *People v. Stoll* (1989) 49 Cal.3d 1136 [265 Cal.Rptr. 111 at pp. 116, 117, 783 P.2d 698].

The *Stoll* decision was issued in December, 1989, four months after defendant was granted review and three months prior to the inexplicable dismissal in March, 1990, of his Petition for Review on grounds it had been improvidently granted in the first instance. (App. C) The *Stoll* decision reversed child molestation convictions on the same grounds asserted as error by defendant in the instant case, to wit, the trial court had erroneously denied admission of defense expert testimony to the effect that he was not suffering from a pathological sexual deviation because it tended to show defendant had no predisposition to commit lewd acts with children.

The *Stoll* decision rejected the arguments relied upon by the appellate court herein based upon the *John W.* and *Bledsoe* decisions that *People v. Jones* (1954) 42 Cal.2d 219 [226 P.2d 38] was no longer viable due to the partial repeal of the MDSO statutes and the *Kelly-Frye* line of cases and held that California Evidence Code, Section 1102,

> "Allows an accused to present expert opinion testimony of this kind to indicate his non-disposition to commit a charged sex offense,"

and stating that the California Law Revision Commission comment states that Section 1102 codified the *Jones* rule to permit introduction of defense expert opinion of "good character" to show noncommission of charged crimes. *People v. Stoll* (1989) 49 Cal.3d 1136 [265 Cal.Rptr. 111 at p. 121, n. 18, and pp. 122-127, 783 P.2d 698].

The California Supreme Court in *People v. Stoll* (1989) 49 Cal.3d 1136 [265 Cal.Rptr. 111 at p. 121, n. 18, and pp. 122-127, 783 P.2d 698], found pursuant to *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243], it was reasonably probable that exclusion of the proffered testimony affected the judgment in light of the inconsistencies in the children's testimony and the defendant's personal denials of guilt. These were identical to the arguments raised by Petitioner in the instant case. (App. D and E)

The charges in the instant case, sex offenses perpetrated against children, are considered so inflamatory in themselves that where such charges exist, any trial errors are likely prejudicial and the law requires strict observance of the rules governing admission and exclusion of evidence. *People v. Evans* (1952) 39 Cal.2d 242, 251 [246 P.2d 636, 642]; *People v. Jones* (1954) 42 Cal.2d 219 [226 P.2d 38]. The trial court excluded Dr. Seawright Anderson's testimony citing Evidence Code, Section 352, stating on grounds that the probative value of the testimony was outweighed by its prejudicial effect and undue consumption of time. However, "Evidence Code, Section 352, must bow to the due process right of defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." *People v. Reeder* (1978) 82 Cal.App.3d 543, 553 [147 Cal.Rptr. 275]. The *Reeder* court cited *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038,

35 L.Ed.2d 297], wherein it was held that the exclusion of evidence, vital to a defendant's defense constituted a denial of a fair trial in violation of constitutional due process requirements. *Id.* at p. 554. This is because the law on the admissibility of evidence is subject to a defendant's due process and Sixth Amendment rights to present a defense. *Chambers v. Mississippi, supra,* 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297]. Finally, the *Reeder* court stated that the refusal of the proffered evidence constituted prejudicial and reversible error citing *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]. Defendant contends the trial court's failure to admit the testimony of his expert was a denial of a fair trial in violation of the United States Constitution Fifth and Sixth Amendment due process requirements which entitles defendant to a reversal of his conviction unless the People can show beyond a reasonable doubt that it did not affect the outcome. *Chambers v. California* (1967) 386 U.S. 18, 28 [17 L.Ed.2d 705, 710]. Even under the more stringent tests announced in *People v. Watson, supra,* 46 Cal.2d 818, 836 [299 P.2d 243] the Supreme Court has held that, "where the evidence, although sufficient to sustain the verdict, is extremely close, 'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial' " *People v. Gonzales* (1967) 66 Cal.2d 482, 493-494 [58 Cal.Rptr. 361, 426 P.2d 929]; *People v. Briggs* (1962) 58 Cal.2d 385, 407 [24 Cal.Rptr. 417, 374 P.2d 257].

Since one of the defendant's grounds for requesting a new trial was the exclusion of Dr. Seawright Anderson's psychiatric testimony and since this was presumably prejudicial to the outcome of his trial, defendant believes his conviction should be set aside and he should be granted a new trial.

III

THE CALIFORNIA SUPREME COURT'S DISMISSAL OF DEFENDANT'S REVIEW WHILE SIMULTANEOUSLY REVERSING A CONVICTION IN ANOTHER CASE ON IDENTICAL GROUNDS, EXCLUSION OF DEFENSE EXPERT TESTIMONY THAT DEFENDANT HAD NO PREDISPOSITION TO MOLEST CHILDREN DUE TO ABSENCE OF SEXUAL PATHOLOGY, VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

The applicable law discussed under Question II above with respect to admissibility of defense expert testimony showing absence of sexual pathology need not be repeated and is incorporated herein.

The *Stoll* decision was issued while Petitioner's case was still pending before the California Supreme Court. The California Supreme Court in *Stoll* reversed the defendant's convictions upon the identical grounds Petitioner had urged and presumably upon which his petition for review was granted. The order granting his review specifically requested counsel not submit briefs pending further notice and disposition of a lead case. (App. B) The *Stoll* decision was issued in December, 1989, after granting review to Petitioner in August, 1989, three months prior to dismissal of his petition, rendering his conviction final.

Petitioner is aware of the line of decisions refusing to hold a state court's failure to follow its state's own laws a due process violation. *Gryger v. Burke* (1948) 68 S.Ct. 1256 [334 U.S. 728, 92 L.Ed. 1683], *rehearing denied,*

69 S.Ct. 13 [335 U.S. 837, 93 L.Ed. 389]. However, Petitioner has been unable to find any case wherein this failure has occurred under similar circumstances as occurred here. This was not a case where the California Supreme Court decided the urged appellate error erronously; it, in fact, issued a decision, *Stoll*, in favor of Petitioner's position advanced in his petition for review then pending before the court. The court simply, inexplicably, failed to give defendant the benefit of said decision allowing his conviction to stand while, virtually, simultaneously reversing convictions in *Stoll*.

Petitioner asserts this form of injustice constitutes deprivation of due process under the Fifth and Fourteenth Amendments in ruling in favor of Petitioner's point of law while depriving him of the benefit thereof as a result of which he is a convicted felon subject to incarceration and forced to register as a sex offender.

CONCLUSION

Given the recent rapid growth of child sexual abuse prosecutions in California and nationwide, review by this Court of these important questions of law is both timely and critical. The rights of defendants as well as victims need to be balanced so that the chance for justice in these cases is enhanced. The understandable concern for the rights of victims appears to be causing a lack of heed for the constitutional rights of the accused. If the Fifth and Sixth Amendment rights to cross-examination, to present a defense, to counsel, and to a fair trial are to be preserved in these cases, it is this Court which must act. For these reasons, Petitioner respectfully requests this petition be granted.

Respectfully submitted,

ANTHONY A. FERRIGNO

Attorney for Petitioner
Larry Gene Kleasner

APPENDIX A

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED
MAY 5, 1989
Court of Appeal
Fourth District

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
LARRY GENE KLEASNER,
Defendant and Appellant.

E004375
(Super.Ct.Nos. CR 25213, CR 25654)

OPINION

Appeal from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed.

Anthony A. Ferrigno, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Leslie B. Fleming, Supervising Deputy Attorney General, Lilia E. Garcia, Deputy Attorney General, for Plaintiff and Respondent.

SEE DISSENTING OPINION

A jury convicted defendant of four counts of lewd and lascivious conduct with a child under the age of 14 years. (Pen. Code § 288, subd. (a).) Defendant was granted five years probation on the condition that he serve six months in jail.

Defendant appeals contending that the trial court (1) erroneously excluded expert testimony that he was not suffering from a mental condition predisposing him to molest children, (2) incorrectly denied his motion to sever for trial three lewd and lascivious counts with two other children of which he was acquitted, (3) admitted child molestation syndrome testimony that related specifically to the victim, and (4) denied a motion to dismiss when he had been bound over for trial without probable cause and without being allowed to cross-examine the victim at the preliminary hearing about an unrelated prior molestation. We affirm.

FACTS

Defendant was charged with five counts of lewd and lascivious conduct with Laloni A. between July and December 1984 when she was 10 years old. He was convicted of four of these counts. He was also charged with two counts of lewd and lascivious conduct with Crystal G. and one count with Jenny L. when both were under the age of 14. Defendant was acquitted by the jury of the two counts concerning Crystal, and the trial court granted a motion under Penal Code section 1118.1 as to the count concerning Jenny.

During the period when the molestations of Laloni occurred, defendant lived with Laloni's stepmother, who had separated from Laloni's natural father. Also living with Laloni's stepmother was Laloni's stepsister, Crystal, whom defendant also allegedly molested. Laloni lived with her natural mother and visited her

stepmother and stepsister on alternate weekends at defendant's residence. Jenny, whom defendant was accused of molesting, was defendant's neighbor. Laloni, Crystal, and Jenny were friends.

Laloni did not recall the order in which the four incidents and one alleged incident of molestation occurred. She was certain that the five incidents happened on four different weekends.

Laloni testified that on one occasion she and defendant had been wrestling in defendant's living room for two or three minutes when he put his hands under her T-shirt and fondled her breasts. This incident was the basis of Count I of which defendant was acquitted. She testified that on another occasion in the defendant's bathroom he lifted her bikini bathing suit top and licked her breasts. This second incident was immediately followed by the third incident when she then walked into the defendant's bedroom, and he laid her on her back on the bed, put his hands under her bikini bottom, and fondled her vaginal area. Laloni testified that during a fourth incident the defendant put her hand down his pants and had her rub his penis. In the fifth incident, Laloni accused defendant of putting his hand in her underwear and fondling her vagina while she was lying on her stomach on a sofa bed watching television in the defendant's living room. These last four incidents were the bases of Counts II, III, IV, and V of which defendant was convicted.

Laloni did not report any of these incidents until 14 to 16 months later when she was watching a television program on child molestation with her mother. Laloni's succeeding reports and testimony suffered from inconsistencies. According to Laloni's mother, Laloni's first descriptions of the four incidents where defendant touched her with his hand or tongue were only of touching the outside of her clothing. At first Laloni did not

tell her mother about the wrestling incident, and, respecting the same incident, Laloni did not tell the investigating officer that the defendant had touched her breasts. Nor did she tell the officer that defendant had put her hand in his pants during the fourth incident. There were numerous inconsistencies in the details of the successive versions of the molestations.

The jury acquitted defendant on the remaining three Counts V, VI, and VII, two of which were alleged by Laloni's stepsister, Crystal, and one by Laloni's friend Jenny.

Defendant testified about his 13-year law enforcement career ending as a Highway Patrol officer. He denied all of the charges and had numerous witnesses testify to his good character.

EXPERT TESTIMONY OF ABSENCE OF PREDISPOSITION TO MOLEST

Defendant contends that the trial court erred in excluding psychiatric expert testimony that defendant was not suffering from a psychological defect, disease, or disorder predisposing him to molest children. We disagree.

Defendant made his offer of proof as follows:

"Specifically, I further make an offer of proof that if [Dr. Anderson] were called to testify he would testify that he reviewed and read all of the reports and files concerning this matter, that he spoke with my client, that he conducted what he believed to be psychoanalytical analysis of the defendant, with a view of determining under generally accepted principles of psychiatry, whether or not the defendant's mental condition evidences any mental disease, defect or disorder; and

specifically that mental disease, defect or disorder, sometimes referred to as pedophilia.

"And that in his professional opinion, based upon his examination of the reports, his examination of the defendant, a discussion with his girlfriend, Judy Conley, that the defendant possesses, at least at the time of the examination, which was in January of 1987, no mental disease, defect or disorder, which would commonly be referred to as pedophilia.

"The purpose for offering that evidence is to show that the defendant doesn't have that mental disease, defect or disorder and therefore, under *People versus Jones* [(1954) 42 Cal.2d 219], the jury might reason that he probably more likely than not did not commit these offenses."

Anderson's testimony would have been based on the purportedly scientific principle that, in the words of the offer of proof, pedophiles exhibit through their behavior a certain "mental condition [that] evidences . . . pedophilia." These behaviors would constitute a syndrome associated with pedophiles which may appropriately be called the "pedophile syndrome."

In *People v. Bledsoe* (1984) 36 Cal.3d 236, at pages 246-251, the Supreme Court held that rape trauma syndrome testimony was subject to the *Kelly-Frye* rule (*People v. Kelly* (1976) 17 Cal.3d 24, 30-32; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014) because it was introduced as a scientific method of proof:

Thus, in this case, the prosecution introduced the rape trauma syndrome testimony, not to rebut misconceptions about the presumed behavior of rape victims, but rather as a means of proving — from the alleged victim's post-incident trauma — that a rape in the legal sense

had, in fact, occurred." (*People v. Bledsoe, supra*, 36 Cal.3d at p. 248.)

As in *Bledsoe*, in this case the defendant proffered pedophile syndrome testimony, not to rebut misconceptions about the presumed behavior of pedophiles that was allegedly similar to behaviors exhibited by defendant, but rather as a means of proving — from defendant's non-pedophilic behavior — that defendant was not a pedophile and therefore was less likely to have committed the charged offenses than if he had been a pedophile.

We conclude that pedophile syndrome testimony is subject to the *Kelly-Frye* standard of admissibility.

The next question is whether pedophile syndrome testimony, as applied to a person who has never engaged in sexual activity with children, is generally accepted in the psychological community as a predictor of such activity. We recognize that, by looking specifically at the reputation of the pedophile syndrome for predicting pedophilia in those who have never engaged in sexual activities with children, we have probably eliminated the single best predictor of future pedophilic behavior, that is, past pedophilic behavior. This narrowing of focus is appropriate because the defendant in this case was not shown to have had engaged in sexual activities with children prior to the charged offenses and because it is a useless tautology that one who engages in pedophilia is a pedophile and one who does not is not. If there are no other factors besides pedophilic activity which mark a pedophile, then the proffered testimony is useless. Defendant could achieve the desired effect on the jury merely by having those who have known him well testify that he has never been observed by anyone in an act of pedophilia to their knowledge. Expert testimony would not be required to assist the jury to conclude that the

lack of any known pedophilic activities makes it less likely that defendant committed the charged offenses.

To answer the question of general acceptance within the pertinent scientific community requires more than just the testimony of one expert. (*People v. Kelly, supra*, 17 Cal.3d at p. 37.) Furthermore, experts testifying on the general acceptance of a scientific method of proof in the relevant scientific community should be qualified to state the view of impartial scientists in that community and be representative of a cross-section of the scientific community. (*Ibid.; People v. Brown* (1985) 40 Cal.3d 512, 533; *People v. Reilly* (1987) 196 Cal.App.3d 1127, 1138-1139.) Experts testifying on this issue should also support their opinions by reference to relevant scientific literature. (*People v. Brown, supra*, 40 Cal.3d at p. 533.)

Only Dr. Anderson's testimony was proffered by the defense. Counsel for the defendant made an oral offer of proof in which he asserted that Dr. Anderson used principles of diagnosis generally accepted in the relevant scientific community. However, the substance of Dr. Anderson's proposed testimony is contained in a written report identified as "Court Exhibit #1," and nothing in the report addresses the issue of general acceptance in the psychological community. Dr. Anderson did not refer in his report to any literature which would indicate that the pedophile syndrome is generally accepted in the psychological community for the purpose for which his testimony was offered. Dr. Anderson appears only to have been a forensic specialist as opposed to a practitioner in the field of sexual deviancy. We therefore find the trial court properly excluded the testimony.

Defendant misplaces reliance on *People v. Jones, supra*, 42 Cal.2d at p. 225, which found similar testimony admissible without reference to the *Frye* rule subsequently adopted by the California Supreme Court in *People v. Kelly* and applied to psychological

syndrome testimony in *Bledsoe*. Jones has been effectively overruled on this point by the cases cited. (*See People v. John W.* (1986) 185 Cal.App.3d 801, 803-808.)

DENIAL OF SEVERANCE MOTION

Defendant contends that the trial court abused its discretion in denying his motion to sever trial of the five counts about Laloni from the three counts involving the other two alleged victims. We disagree.

People v. Williams (1984) 36 Cal.3d 441 sets forth the four factors to be considered in determining whether defendant has made the clear showing of prejudice necessary to establish an abuse of the trial court's discretion to try multiple charges separately or together. (*Id.*, at p. 447.) The first factor is cross-admissibility — whether evidence of one or more of the charges would be admissible in a separate trial or trials of one or more of the other charges. Of course, if such cross-admissibility exists, severance is pointless and obviously no prejudice results from a joint trial. If, as is the case here, evidence about one charge would not be admissible in a separate trial of another charge, a consideration of the remaining three factors is required. (36 Cal.3d at pp. 448, 451.)

The first factor is whether one or more of the crimes is of such a highly inflammatory nature that the jury would be prejudiced against the defendant in its consideration of the defendant's guilt or innocence of other less inflammatory charges. (36 Cal.3d at pp. 452, 453.) The second factor is whether the jury is likely to have used the evidence against the defendant on one or more of the charges to convict the defendant on one or more of the other charges. (36 Cal.3d at pp. 452, 453-454.) Joinder of charges of which the evidence is stronger on some charges and weaker on others is particularly

prejudicial (*People v. Smallwood* (1986) 42 Cal.3d 415, 429), but prejudice also arises from joinder of charges as to which there is no relative difference in the strength of the evidence. (*People v. Williams, supra*, 36 Cal.3d at pp. 453-454.) The third factor obviously irrelevant to this case is whether any of the charges carries the death penalty. (36 Cal.3d at pp. 452, 454.)

Defendant argues that the first two factors applied to this case show that he was substantially prejudiced by joinder of the charges respecting all three girls. As to the first factor, he asserts that the charges against him concerning Laloni were more inflammatory than the charges concerning the other two girls in which the alleged touching was only effected through their clothing. As to the second factor, defendant asserts that the charges brought on behalf of Laloni were stronger than those brought on behalf of the other two girls. However, defendant does not limit his argument to the prejudice to the weaker and less inflammatory counts about Crystal and Jenny caused by joining the stronger and more inflammatory counts about Laloni, but also argues that the trial of eight counts of child molestation creates a cumulation of evidence and inflammatory effect that influences the jury to conclude that, with so many charges of child molestation against the defendant, he must have committed at least some of the offenses. (*Cf. Williams v. Superior Court, supra*, 36 Cal.3d at pp. 453-454 [highly prejudicial gang membership evidence on both murder counts and jury tendency to aggregate all the evidence].)

Defendant's contentions concerning the influence of the more inflammatory and stronger charges involving Laloni on the less inflammatory and weaker charges involving the other two girls in fact failed to materialize. Defendant was acquitted of all of the charges concerning

Crystal and Jenny, and any error was obviously harmless with respect to those charges.

With respect to the defendant's argument of cumulative prejudice resulting in his conviction of four of the five charges concerning Laloni, it is clear that trying the three weaker and less inflammatory charges concerning Crystal and Jenny with the five other charges did not influence the jury to convict the defendant on four charges. Since the jury thought defendant was unjustly accused of the three molestations of Jenny and Crystal, the jury was more likely to have severely scrutinized the evidence on the Laloni charges and, indeed, the jury was unable to reach a verdict on one of those charges.

Defendant misplaces reliance on *People v. Smallwood, supra*, 42 Cal.3d 415. In that case the Supreme Court found that the evidence that defendant murdered House was "extremely weak" and "must necessarily have been bolstered by allowing the jury to receive evidence of the unrelated Dunbar homicide." (42 Cal.3d at p. 430.) "The principal prosecution witnesses on [the House charges] . . . were admitted drug users whose ability to observe was less than ideal. In the Dunbar charges, by contrast, one of the principal prosecution witnesses was a disinterested observer with no apparent ties to the community." (42 Cal.3d at p. 433.) The defendant presented a defense to the stronger, Dunbar charges, but not to the weaker, House charges. The jury convicted the defendant on the weaker, House charges, but could not reach a verdict on the stronger, Dunbar charges. The Supreme Court held that jointly trying the two sets of charges substantially prejudiced the defendant as to the weaker House charges because the verdict may have "represented a compromise resulting from the spillover effect of considering the two unrelated groups of charges" and because "[t]he jury may well have given adverse consideration to appellant's

failure to have produced any witnesses in defense against the House charges." (42 Cal.3d at p. 433.) Defendant argues that a similar "compromise resulting from the spillover effect of considering the two unrelated groups of charges" occurred in this case.

The danger of such a compromise occurring was far less in this case than in *Smallwood* because of a number of differences between the two cases. First, in this case defendant was convicted of the charges which he contends were the stronger ones and acquitted of the weaker ones, just as would be expected. Just the opposite occurred in *Smallwood* showing that something was wrong with the jury's deliberations.

Second, the court in *Smallwood* made it clear that greater scrutiny was required in a death penalty case. (42 Cal.3d at pp. 430-431.) *Smallwood* was a death penalty case; this case is not.

Third, in *Smallwood* the defendant presented a defense as to the stronger Dunbar charges, but not as to the weaker House charges, thereby increasing the possibility that the jury would compare the defendant's different approach to the charges and improperly consider the defendant's lack of a defense to the House charges in reaching a verdict. In this case the defendant presented the same defense to all the charges and there was no such danger of prejudice.

Fourth, the delay in reporting and inconsistencies in Laloni's various descriptions of the offenses cannot be compared with the more fundamental problems with the case against Smallwood on the House charges. The delays and inconsistencies were the subject of expert testimony that they were not necessarily indicative of falsehood. The jury acquitted the defendant of the molestation allegedly occurring while the defendant and Laloni wrestled; this acquittal indicates that the jury considered her delay in reporting the incident to her

mother and/or her failure to tell an investigating officer that defendant had touched her breasts underneath her clothes. By contrast, in *Smallwood* there was no eyewitness of the House homicide at the time of the severence motion and only the testimony of an admitted narcotics user who had told her story to police only after she had acquired a grudge against the defendant seven or eight months after the homicide. (42 Cal.3d at pp. 430, 432.)

These differences between *Smallwood* and this case not only render *Smallwood* useless as support for defendant's arguments, but also by contrast show the lack of any substantial prejudice in this case from the joint trial of all eight counts.

CHILD MOLEST SYNDROME TESTIMONY

Defendant contends that the trial court erred in admitting testimony about the child molest syndrome. We disagree.

Child molest syndrome testimony is not admissible to prove that an alleged victim was molested; however, it is admissible to refute misconceptions about the post-molest behavior of molest victims in general. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393.) To be admissible for the latter purpose, the expert syndrome testimony must relate to a misconception suggested by the evidence and the jury must be instructed upon request that the syndrome testimony may not be used as evidence that the alleged victim was in fact molested. (*Id.*, 203 Cal.App.3d at pp. 393-394; *People v. Bothuel* (1988) 205 Cal.App.3d 581, 587-588.) The syndrome testimony must be general in character, that is, it should not discuss the peculiar facts of the case; this requirement is necessary to avoid any implied invitation to the jury to use the alleged victim's syndrome-like behavior as evidence that the alleged victim was molested.

(*People v. Bowker, supra*, 203 Cal.App.3d at p. 393, 394-395.)

Defendant contends that Dr. Rath's testimony discussed facts peculiar to this case. The facts defendant believes were alluded to are as follows: Laloni testified that the alleged incidents occurred when she was ten years old. Laloni and her mother testified that Laloni first reported the alleged abuse to her mother after watching a television program on child abuse. Laloni's mother asked her whether she had ever had any experience like that. At that point Laloni told her mother about defendant's alleged molestations. Laloni told her mother that she felt she had done something wrong and was concerned that the molestation had "felt good."

The questions and answers which defendant contends allude to these facts began with the prosecution question as to when and how children 10 years of age reveal that they have been abused. The first objection to Dr. Rath's testimony of record appears at this point when defense counsel stated his objection at the bench and off the record. The admissibility of Dr. Rath's testimony had been raised in an Evidence Code section 402 hearing prior to the trial; however, the ruling was deferred until defense counsel could familiarize himself with the pertinent cases and no reporter's transcript of any further hearing on this issue is in the record on appeal. The trial court's response to this off-the-record objection made it clear enough what the objection was: "I understand, but it is getting into specific facts." I think it is still general enough. I will overrule the objection." Defense counsel raised no further objection to Dr. Rath's testimony.

Dr. Rath then answered the question about how 10-year-old children generally tell about nonviolent, nonpainful sexual molestation:

". . . Generally what we're talking about, as called in the literature, 'the secret,' the meaning being

molestation. . . . Children as a class tend not to reveal the secret until something else happens. If at all, they'll reveal it — if a few days have gone by and they haven't revealed it then something else has to intervene and those interventions will be something like a *television program*, an educational situation at school where you are told to tell. If that sort of thing happens, *direct questioning by a suspicious adult*, that sort of thing, will elicit the breaking of the secret." (Emphasis added.)

In response to a subsequent question by the prosecutor to which no objection was raised, Dr. Rath testified that the "main determiner of whether a child keeps a secret is . . . how much wrong-doing they felt they were involved in. . . . Most victims . . . experience some degree of enjoyment at some level . . . and because of that . . . almost inherent in the situation is the degree of guilt and the guiltier they are, the less likely they are to reveal the secret, because they feel as if they had a part in it."

We find that the above testimony does not discuss any facts peculiar to the facts of this case. The fact that Laloni made her revelations after seeing a television program on child abuse is not a fact peculiar to this case. Rather, as Dr. Rath testified, it is a common occurrence in many child molest situations. Nor do we see questioning by an adult after such a television program as peculiar to this case. We make the same holding with respect to Laloni's comment that it felt good and that she thought that she had done something wrong. As Dr. Rath testified these are all common occurrences in any child molest situation.[1]

---

[1] Defendant also contends that the doctor's testimony that "the more events there are, the more they will tend to be confused with — there is a magic number, actually, called seven, plus or minus two. Without getting too complicated that means that if you get —

(continued)

Furthermore, any error was harmless. The prosecution was entitled to introduce expert testimony dispelling the myth that children report incidents of sexual abuse immediately and without prompting. Dr. Rath's testimony was unquestionably admissible insofar as he pointed out that delay is common and that once delay has occurred some intervening event and/or questioning by an adult is needed to precipitate a report. Additionally, the People are entitled to explain some of the dynamics behind the delay in reporting, such as the guilt feelings experienced by the victim which may be heightened by an pleasure they may have felt during the experience.

The doctor's reference to 10-year-old Caucasian girls was not overly specific because the jury was already aware that Laloni was 10 years old at the time of the incident and would assume that the doctor's testimony even without reference to 10-year-old white girls, would apply to such persons.

Thus, making the questions more general than they already were would not have had a reasonable probability of changing the jury's verdict. (*Cf. People v. Bowker, supra*, 203 Cal.App.3d at p. 395.)

DENIAL OF MOTION TO DISMISS COUNT INVOLVING JENNY L.

Defendant contends there was not sufficient cause to hold defendant to answer for the count involving Jenny. Defendant contends that this prejudiced him in the same

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(ftn. continued)
the closer you get to that number, or if you exceed that number, you can almost be sure that there is going to be confusion between individual events." Defendant's contention that this testimony related to the peculiar facts of this case, because seven minus two equals five which is the exact number of events Laloni reported, does not merit response.

manner as evidence of an uncharged incident. (*See People v. Smallwood, supra*, 42 Cal.3d at p. 428.) We disagree.

Sufficient cause to hold the defendant to answer is found where the facts at the preliminary hearing are such as to " 'lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused . . . .' " (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7-8.)

The evidence presented at the preliminary hearing was that the defendant had been in back of Jenny and had put his hands over her shoulders and rubbed them over her breasts to her stomach where her rested his hands while he asked her a question, thereafter rubbing his hands back up her body over her breasts again.

The key determination to be made is whether defendant rubbed over the victim's breasts with the intent of obtaining or giving sexual gratification. A touching of the child's bare skin is not necessary. (*People v. Ash* (1945) 70 Cal.App.2d 583, 584.)

Defendant argues that since the trial court subsequently dismissed the count concerning Jenny after the prosecution had presented its case-in-chief pursuant to section 1118.1, that this requires that we hold the trial court had erred in denying the motion to dismiss pursuant to section 995. This contention is frivolous because the standard differs under each section. In a section 996 motion, the issue is whether there is sufficient evidence to establish *probable cause* that defendant committed the crime. (*See e.g., People v. McKee* (1968) 267 Cal.App.2d 509, 514-515 [issue on § 995 motion is "whether there is reasonable or probable cause to believe the defendant guilty"].) With a section 1118.1 motion, the issue is whether there is sufficient evidence to establish *beyond a reasonable doubt* that the defendant committed the crime. (*See: People v. Veitch* (1982) 128

Cal.App.3d 460, 466 [trial court applies same standard of review as appellate court]; *People v. Johnson* (1980) 26 Cal.3d 557, 562 ["substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt"].) Making the latter finding does not preclude making the former finding because the former finding under section 995 is more lenient than the finding under section 1118.1. (*See People v. McKee, supra*, 267 Cal.App.2d at p. 514 [issue on § 995 motion does not "concern the quantum of evidence necessary to sustain a judgment of conviction"].)

DISMISSAL OF COUNTS CONCERNING LALONI A.

Defendant contends that his motion to dismiss all of the counts concerning Laloni A. should have been granted because he was denied the opportunity to cross-examine Laloni A. about her immediate reporting of an unrelated molest when she was aged 3. Defendant's theory for the cross-examination was that if Laloni had immediately reported a molest incident at age 3, why had she not reported immediately the incidents that occurred to her when she was 10. Defendant's contention misses the mark.

Where a defendant challenges the legality of his being bound over to the superior court for trial, the issue is " 'whether the defendant was prejudiced or deprived of a substantial right at the preliminary examination.' " (*People v. Nokes* (1986) 183 Cal.App.3d 468, 476.)

While we recognize the defendant's right to cross-examine witnesses at the preliminary hearing (*Jennings v. Superior Court* (1967) 66 Cal.2d 867, 875), in view of the circumstances, we find no prejudice or deprivation of a substantial right. The trial court at the preliminary hearing refused to allow that cross-examination because

defense counsel had already been able to bring out on cross-examination the fact that Laloni knew she could have reported the offenses that occurred to her when she was 10, but that she did not know why she did not do so. In view of this answer, questioning why she did not report the incidents when she was 10 if she did report the incidents when she was 3 would have been pointless since Laloni had already answered that she did not know why she had not immediately reported the later incidents.

The only effect the trial court's ruling at the preliminary hearing had on defendant's case was to eliminate from the evidence any reference to Laloni's immediate report of her molestation at age 3 when defendant had already made his point that there was no reason why Laloni had waited so long to report the alleged abuse. Thus, defendant's right of cross-examination was not significantly limited. (Contrast *Jennings v. Superior Court, supra*, 66 Cal.2d at pp. 872-873 [trial court excluded as irrelevant at a preliminary hearing cross-examination and evidence concerning entrapment].)

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

CAMPBELL
P.J.

I concur:

MC DANIEL
J.

I respectfully dissent:

I

The trial court committed reversible error in admitting so-called "expert" testimony on the child sexual abuse accommodation syndrome (CSAAS). The issue the majority do not confront is whether this evidence violates the *People v. Bledsoe* ((1984) 36 Cal.3d 236) rule prohibiting expert testimony concerning the CSAAS to prove child abuse occurred. A host of cases holds the admission of such testimony for this purpose is error. Such proffered testimony has yet to pass the *Kelly-Frye* test of admissibility. (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014.)

Relying on *Bledsoe*, numerous Courts of Appeal have held that *Kelly-Frye* similarly precludes an expert from testifying based on the CSAAS that a particular victim's report of alleged abuse is credible because the victim manifests certain defined characteristics which are generally exhibited by abused children (*See In re Sara M.* (1987) 194 Cal.App.3d 585, 593; *Seering v. Dept. of Social Services* (1987) 194 Cal.App.3d 298, 310-311, 313; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1099; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1069; *People v. Bowker* (1988) 203 Cal.App.3d 385, 391 (hg. den. Nov. 10, 1988; *People v. Bothuel* (1988) 205 Cal.App.3d 581, 587-588.)

This testimony was offered to bolster as weak a People's case as can be filed. The defendant is a California Highway Patrol officer of many years of successful performance, as well as scrutiny of his work

and his character by superiors — not one iota of corroborative evidence is presented to show this defendant to be anything but what he here professes to be — an innocent victim of a child's false charges. Kleasner's protestations are supported by the post-judgment examination, ordered by the court and conducted by impartial state-hired experts. While such evidence was used on sentencing, it was precluded on the issue of his innocent intent.

In contrast, irrelevant, highly emotionally-charged testimony was admitted, adding an aura of authenticity to evidence from the complaining witness containing "numerous inconsistencies" and made some 14-16 months after the alleged events occurred. This "expert" testimony in a concededly weak case provided the "aura of infallibility" for unacceptable, unproven, unscientific testimony. (*People v. McDonald* (1984) 37 Cal.3d 351.)

II

To add insult to injury, Kleasner was denied admission of the only evidence from an outsider to establish the fact he did not fit the pedophile profile in any respect. This was highly relevant on the issue of intent to molest. Expert testimony of this specie has long been held admissible on the issue of whether a person was a mentally disordered sex offender (MDSO). The characteristics of a pedophile are not so well known as to preclude a qualified psychiatrist (M.D.), a psychologist on this subject. Kleasner proffered the testimony of Dr. Anderson for this precise purpose. While the MDSO laws have been repealed, yet such expert testimony is uniformly admitted all over this state in *sentencing procedures* where a sex offense has been established by verdict. Such an examination was ordered by the court in this case. After thorough examination, Kleasner was

given a clean bill of sexual health. *He does not have the characteristics of a pedophile.*

Thus, Kleasner was twice wronged: pre-trial court allowed evidence against him in violation of rule I of *Bledsoe* and its progeny. At the same time he was denied his best opportunity to prove the most important issue in this case — lack of intent to molest. Character witnesses are not enough and not relevant to the precise point that would be available from an expert psychiatrist, who used the modern test available to examine into the psyche of an accused. The fact that the legislative imprimatur on MDSO findings has been withdrawn does not in any rational way authorize a rule of inadmissibility for such evidence. Multiple bases for admissibility exist dehors the legislative repeal of the MDSO statutes. Dr. Anderson's testimony is but another specie of expert testimony depending for its admissibility upon Evidence Code sections 720 and 801. His evidence was relevant on the issue of Kleasner's lack of intent to molest. It should have been admitted.

I would reverse the judgment and grant a new trial.

NOT FOR PUBLICATION.

/s/ Staniforth *

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council

APPENDIX B

ORDER GRANTING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Two,
No. E004375, SO10665

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
AUG 10 1989
Robert Wandruff Clerk
Deputy

PEOPLE, Respondent,

v.

LARRY GENE KLEASNER, Appellant

Appellant's petition for review GRANTED.

Submission of additional briefing, otherwise required by rule 29.3, California Rules of Court, is hereby deferred pending further order of the court.

Appointment of counsel is deferred pending disposition of a lead case. (See Rule 29.2 (c), California Rules of Court.)

EAGLESON
Acting Chief Justice

MOSK
Associate Justice

PANELLI
Associate Justice

KENNARD
Associate Justice

Associate Justice

Associate Justice

Associate Justice

APPENDIX C

4/2 E004375 - SO10665

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
MAR 15 1990
Robert Wandruff Clerk
Deputy

FILED
MAR 22 1990
Court of Appeal
Fourth Dist.

PEOPLE
v.
LARRY GENE KLEASNER

Pursuant to Rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, Fourth Appellate District, Division Two.

Author: J. Campbell
I concur: J. McDaniel
I dissent: J. Staniforth*
* assigned

Lucas
Chief Justice

Panelli
Associate Justice

Arabian
Associate Justice

Eagleson
Associate Justice

_____
Associate Justice

_____
Associate Justice

_____
Associate Justice

I, Robert F. Wandruff, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this _____ day of MAR 15 1990 A.D. 19__

By Clerk
/s/ L. Marota
Deputy Clerk

ORIGINAL

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

** REMITTITUR**

PEOPLE OF THE STATE OF CALIF.
Plaintiff-Respondent
vs.
KLEASNER, LARRY GENE
Defendant-Appellant

Case No. E004375
Superior Ct. No. CR25213
County of Riverside

I, STEPHEN M. KELLY, Clerk of the Court of Appeal, State of California, Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on May 5, 1989 and this opinion or decision has now become final.

Witness my hand and seal of
the Court this March 22, 1990.

(Seal)

Stephen M. Kelly, Clerk
By: /s/ S. Beaux
Deputy Clerk

cc: All parties (Copy of remittitur only, Rule 25(e), California Rules of Court).

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APPENDIX D

4 Crim. E004375

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
LARRY GENE KLEASNER,
Defendant and Appellant.

NO. E004375
Superior Court No. CR 25213
Consolidated with CR 25654

APPEAL FROM THE SUPERIOR COURT OF
RIVERSIDE COUNTY
Honorable Edward D. Webster, Judge

APPELLANT'S OPENING BRIEF

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Attorney for Appellant

* * *

People v. Jones (1954) 42 Cal.2d 219 [266 P.2d 39] the jury might reason that he probably more likely than not did not commit these offenses, was denied. (R.T. p. 20 lines 12-20, p. 26 line 12 through 27 line 15, p. 322 line 3 through 331 line 9, p. 467 line 8 through p. 469 line 12, p. 469 line 13 through 473 line 18). Doctor Andersen [*sic*] was represented as a board certified psychiatrist and neurologist who had qualified as an expert in both superior and municipal courts in California relating to questions of whether or not persons have mental diseases, defects or disorders which might predispose them to committing acts of sexual misconduct with children. (R.T. p. 467 line 27 through p. 468 line 7.)

ARGUMENT

I

PSYCHIATRIC TESTIMONY IS ADMISSIBLE TO SHOW ABSENCE OF MENTAL DEFECT, DISEASE OR DISORDER PREDISPOSING DEFENDANT TO MOLEST CHILDREN

The courts' exclusion of psychiatric expert testimony to show defendant was not suffering from a mental defect, disease or disorder predisposing him to molest children was error under (*People v. Jones, supra*, 42 Cal.2d 219, pp. 224, 225 [226 P.2d 38].).

In the *Jones* case the defendant was convicted of two counts of Pen. Code section 288, subdivision (a) with a nine year old girl. Defendant did not claim that the evidence was insufficient to support the verdict but that it was directly conflicting and evenly balanced in that

refusal of the trial court to admit expert psychiatric opinion evidence as to whether or not defendant is a sexual deviate was reversible error. Just as in this case, the only direct evidence from the *Jones* case was the charges by the child and the defendant's denials, the child's testimony was impeached to some extent and there was uncontroverted evidence tending to prove defendant's good reputation for morality. Just as in the instant case, defendant offered psychiatric testimony that he was not a sexual deviate to allow the jury to draw the reasonable inference, should they so desire, that defendant did not commit the acts denounced by section 288. (*People v. Jones, supra*, at p. 226.) The *Jones* court held that the exclusion of the psychiatric testimony was prejudically [*sic*] erroneous and that therefore there had been a miscarriage of justice citing *California Constitution*, article VI, section 4 1/2 and reversed the order denying the motion for a new trial. *People v. Jones, supra*, at p. 226.

Defendant contends the trial court's reliance upon (*People v. John W.* (1986) 185 Cal.App.3d 801 [299 Cal.Rptr. 783]) in excluding defendant's expert's testimony failed to distinguish the facts in that case which questioned the continued viability of the *Jones'* holding. *Id.* at pp. 806, 807. The defendant in *John W.* offered the testimony of a psychologist, not a psychiatrist, as required by *Jones*. (*People v. John W., supra* at pp. 807, 808.) Since psychiatric testimony was not offered in the *John W.* case the statements in that opinion questioning the continued viability of the *Jones* holding are presumably dicta.

The continued viability of *Jones* with regard to the issue of competency of a psychiatrist in the field of sexual deviancy was questioned in *John W.* due to the repeal of the mentally disordered sex offender committment [*sic*] statutes upon which the *John W.* court said the

Jones decision was grounded, despite recognizing the legislature carried forth essentially intact the language of former sections 5504 through 5506 in sections 6307 through 6309 of the Welfare and Institutions Code concerning psychiatric examination of those committing sexual offenses against children. (*People v. John W., supra*, 185 Cal.App.3d 801 at p. 807, 808). However the *Jones* court not only relied on the mentally disordered sex offender statutes but also upon Pen. Code sections 290 and 288.1. (*People v. Jones, supra* 42 Cal.2d 219 at p. 224, 225). Pen. Code section 290 requires a sex offender to register with the sheriff or chief of police in the area in which he resides and Pen. Code section 288.1 requires a first offender convicted of a sex offense with a child under 14 be examined by reputable psychiatrists as to his mental condition before he may be placed on probation. Defendant was ordered to do both in this case and his expert's report was allowed to serve as his 288.1 Pen. Code report. Those provisions of law are still in effect and presumably are grounded on the legislative concern that sex offenders may suffer from a mental condition that increases the likelihood they will commit additional crimes against children.

The trial court was offered the testimony of a psychiatrist experienced in performing section 288.1 Pen. Code evaluations and in fact the court appointed him to do one on defendant upon defendant's conviction. He had examined the defendant and his opinion was that the defendant did not suffer from a mental disease, defect or condition that predisposed him to commit sex crimes against children. To hold now that such psychiatric testimony is incompetent to evaluate the mental condition of sex offenders is to, in effect, ignore the continued need and efficacy of these statutes. The repealing of mentally disordered sex offenders' statutes should not be viewed as a rejection of years of study and

experience in a separate field of competence developed by the doctors of psychiatry and utilized by the courts over many years. In fact, the trial court in this case allowed the People's expert, Dr. Rath, a psychologist, to testify to his competence in this field and to the fact that child molesters were a special group who had special traits only recognizable by those with training, education and experience in the field of sexual deviancy and which traits are not discernable by untrained lay people. This testimony was allowed over defendant's objection and in the People's rebuttal phase of the People's case to presumably meet and overcome the testimony of defendant's character witnesses, people without that special training who testified, in effect, that defendant was a good person incapable in their eyes of committing acts of child molestation.

To allow the People to present such expert testimony to prove defendant's character witnesses are not specially trained to be able to discern one likely to commit sex crimes because sex offenders suffer from a mental condition and have traits only recognized by experts trained in the field, and to then, on the other hand, deny defendant the opportunity to show, through his expert witness, he does not possess those qualities seems per se evidence of an unfair trial.

Defendant contends the court should apply the *Jones* holding to the facts of this case and reject the *John W.* court's reasoning which questions the continued viability of the *Jones'* decision.

"Relevant Evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code section 210.)

Proof of the good character of the defendant may be considered as a fact tending to rebut the truth of testimony of an incriminatory character which is sufficient to

establish the truth of the charge against him. (*People v. Green* 217 Cal. 176, 183 [17 P.2d 730].) Such evidence is sufficient to create a reasonable doubt of guilt. (*People v. Bell* 49 Cal. 489.)

The charges in the instant case, sex offenses perpetrated against children, are considered so inflamatory in themselves that where such charges exist, any trial errors are likely prejudicial and the law requires strict observance of the rules governing admission and exclusion of evidence. (*People v. Evans* 39 Cal.2d 242, 251 [246 P.2d 636, 642], *People v. Jones, supra*, 42 Cal.2d 219.) The trial court excluded Dr. Seawright Anderson's testimony citing Evid. Code section 352 stating on grounds that the probative value of the testimony was outweighed by its prejudicial effect and undue consumption of time. However, "Evid. Code section 352 must bow to the due process right of defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553; [147 Cal.Rptr. 275].) The *Reeder* court cited *Chambers v. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, wherein it was held that the exclusion of evidence, vital to a defendant's defense constituted a denial of a fair trial in violation of constitutional due process requirements. (*Id.* at p. 554.) This is because the law on the admissibility of evidence is subject to a defendant's due process and Sixth Amendment rights to present a defense. (*Chambers v. Mississippi, supra*, 410 U.S. 284.) Finally the *Reeder* court stated that the refusal of the proffered evidence constituted prejudicial and reversible error citing *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243. Defendant contends that the trial court's failure to admit the testimony of his expert was a denial of a fair trial in violation of the United States Constitution Sixth Amendment due

process requirements which entitles defendant to a reversal of his conviction unless the People can show beyond a reasonable doubt that it did not effect the outcome. (*Chapman v. California* (1967) 386 U.S. 18, 23 [17 L.Ed.2d 705, 710].) Even under the more stringent tests announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] the Supreme Court has held that, "Where the evidence, although sufficient to sustain the verdict, is extremely close, 'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial.' " [*sic*] (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494 [58 Cal.Rptr. 361]; *People v. Briggs* (1962) 58 Cal.2d 385, 407 [24 Cal.Rptr. 417].)

Since one of defendant's grounds for requesting a new trial was the exclusion of Dr. Seawright Anderson's psychiatric testimony and since this was presumably prejudicial to the outcome of his trial, defendant believes his conviction should be set aside and he should be granted a new trial.

* * *

EXCERPTS FROM PETITIONER'S REPLY BRIEF

* * *

I

IT WAS PREJUDICIAL ERROR TO EXCLUDE DR. ANDERSON'S OPINION TESTIMONY THAT DEFENDANT DID NOT HAVE A MENTAL DISEASE, DEFECT OR DISORDER PREDISPOSING HIM TO MOLEST CHILDREN.

Appellant contends that *People vs. Jones* (1954) 42 Cal. 2d, 219, 266 Pac. 2d 38, required the admission of Dr. Anderson's testimony notwithstanding the repeal of the mentally disordered sex offender commitment statutes. Respondent's brief seems to imply that the *Jones, supra*, decision requires that Dr. Anderson's opinion first "satisfy threshold standards of the *Kelly-Frye* line of cases." (Respondent's brief, page 13.) Nowhere in the *Jones, supra*, opinion is that line of cases discussed or relied upon in any way. While the *Jones, supra*, court stated, "The competency of expert opinion in this field of evidence is established by the statutory procedure for the determination of sexual psychopathy. Welf. & Inst., code sections 5504-5506. . . .," the court also expressly disapproved the opinion in *People vs. Sellers*, (1951) 103 Cal. App.2d, 830, 831-832, 230 Pac. 2d, 398, 399 upholding the rejection of the testimony of a physician specializing in neurology and psychiatry that defendant was normal in his sexual orientation in the sense that he was not disposed to commit homosexual acts and to show he was less likely to be a person who would have

committed the related criminal acts, section 288, subd. (a) of the Pen. Code, with another adult male, alleged in that case. *People vs. Jones, supra*, 42 Cal. 2d, 219 at pages 224, 225. The mentally disordered sex offender statute would not have applied in a simple section 288, subd. (a) Pen. Code violation with another adult male and yet, the *Jones* court states, "Insofar as *People vs. Sellers, supra*, is inconsistent with these conclusions, it is disapproved." Therefore, the court apparently determined, and appellant contends, rightly so, that a neurologist/psychiatrist, by virtue of this medical specialty and training is competent to give expert opinion upon the question of an individual's mental disposition to engage in, or not, certain sexual conduct independent of the fact that at that time there was also a statutory basis for determination of that competency.

Respondent cites *People vs. John W.*, (1986) 185 Cal. App. 3d, 801, 807-808 for the proposition, in effect, that elimination of the mentally disordered sexual offender commitment statutes, suddenly makes psychiatrists incompetent to determine whether or not a person suffers from a mental defect or disorder that may predispose him to engage in certain abnormal sexual acts with children. In so arguing, respondent ignores certain significant facts about the *John W., supra*, decision as it related to *Jones, supra*. The *John W., supra*, case involved the proffered testimony of a psychologist, not a psychiatrist as in *Jones, supra*. The *John W., supra*, opinion recognized that the language of former sections 5504 through 5506 of the Welf. & Inst. Code was carried forth intact in section 6307 through 6309 of the Welf. & Inst. Code. The *Jones, supra*, court relied also upon sections 290 and 288.1 of the Pen. Code. All of these distinctions are set forth in appellant's opening brief. (Appellant's opening brief, page 20, line 26 through page 22, line 7.)

Respondent also contends that because Dr. Anderson's report cited the statement of the appellant that he did not have abnormal sex impulses towards children that appellant's statement was being offered "for the truth of the matter asserted."

However, Dr. Anderson was not offering appellant's statement for the truth but was only partially basing his expert opinion that appellant was not suffering from a mental disease, defect, or disorder which might predispose him to molest children, on the statements of the appellant. The statement was not offered to prove that he did not have abnormal sexual impulses but only as part of the information the doctor relied upon to arrive at his opinion that this person did not have a mental disease, defect or disorder which might predispose him to committing acts of sexual misconduct with children. The jury, had it been given the opportunity to hear such evidence, would have been free to evaluate the basis of Dr. Anderson's opinion; the weight it should be given, and whether or not this evidence tended to prove that he was more likely or not to have committed the crimes charged.

With respect to respondent's contentions that appellant's statements to Dr. Anderson would be admitted for the truth of the matter asserted, an analogous situation was discussed in *Jones, supra.* There, the doctor had apparently used sodium pentothal and, in part, relied on statements given by the appellant while under the drug's influence. The court stated, "Here, the proffered evidence was not the answers of Jones to certain questions, but the interrogator's expert analysis of those answers for the purpose of determining whether Jones was a sexual deviate, that is, a sexual psychopath. The inference that Jones did not commit the offenses charged was to be drawn, if at all, from the psychiatrist's opinion in regard to the sexual propensities of Jones and not from

any answers given by him while under the influence of the drug. Jones' responses were the means to an end, the end being proof of the fact that Jones was not a sexual deviate." As in *Jones, supra*, therefore, the statements of appellant were used for Dr. Anderson to arrive at his opinion, not for proof of the matter asserted.

* * *

APPENDIX E

CR NO.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
JUN 14 1989
Robert Wandruff Clerk
Deputy

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
LARRY GENE KLEASNER,
Defendant and Appellant.

CR NO. _____
Court of Appeals No. E004375
Superior Court No. CR 25213
Consolidated with CR 25654

PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court of the State of California, Riverside County
Honorable Edward D. Webster, Judge

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Attorney at Law
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Corona, CA 91719

Attorney for Appellant

* * *

qualified as an expert in both superior and municipal courts in California relating to questions of whether or not persons have mental diseases, defects or disorders which might predispose them to committing acts of sexual misconduct with children. (R.T. p 467 line 27 through p 468 line 7).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I

IN CHILD MOLESTATION CASES IS MEDICAL/PSYCHIATRIC TESTIMONY, OTHERWISE ADMISSIBLE TO SHOW ABSENCE OF MENTAL DEFECT, DISEASE, OR DISORDER PREDISPOSING DEFENDANT TO MOLEST CHILDREN EXCLUDABLE FOR FAILURE TO MAKE A PREADMISSION *KELLY-FRYE* SHOWING AND IN THE WAKE OF REPEAL OF THE M.D.S.O. STATUTE?

The Supreme Court's decision in *People v. Jones* (1954) 42 Cal.2d 219 [226 P2d 38], held that the trial court's exclusion of medical/psychiatric expert testimony to show Defendant was not suffering from a mental defect, disease, or disorder predisposing him to molest children was error. The Fourth District Court of Appeal herein declined to follows [*sic*] the *Jones* decision and instead relied upon *People v. John W.*, (1986) 185 Cal.App.3d 801 [229 Cal.Rptr. 783], a First District Court of Appeal decision, to exclude Defendant's expert's medical/psychiatric testimony that Defendant was not suffering from such a mental defect, disease or

disorder. This contravenes the principle of Stare Decisis and threatens uniformity of decision. *People v. Scott* (1976) 16 Cal.3d 242 [128 Cal.Rptr. 39; 546 P.2d 327]. It appears the Court of Appeal has exceeded it's [*sic*] jurisdiction. *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280 [109 P.2d 942]. In *People v. John W.* (supra), the continued viability of the *Jones* decision was questioned in light of the repeal of the Mentally Disordered Sex Offender statute (hereinafter "MDSO"). The *John W.* decision, however, dealt with the proffered testimony of a psychologist, based on the results of a physical test as a gauge of sexual deviancy, and not based upon medical/psychiatric expert opinion testimony as in the *Jones* (supra) case, and as in the instant case, and is therefore materially distinguishable on it's [*sic*] facts. Also, while *John W.*, (supra) in what is presumably dicta, rejected the continuing viability of *Jones* (supra) in light of the repeal of the MDSO statute, which statute *John W.* (supra) regards as the basis for admission of psychiatric testimony in *Jones* (supra) a close reading of *Jones* (supra) reveals admission of the medical/psychiatric testimony therein was not solely dependent on the MDSO statute. The *John W.* (supra) court, expressly disapproved the opinion in *People v. Sellers* (1951) 103 Cal.App.2d 830, 831-832 [230 P.2d 398] upholding the exclusion of like character evidence (sexual orientation evidence) with respect to a prosecution not coming within the ambit of the then in force MDSO statute and cited as well other statutes other than the since repealed MDSO in support of admissibility of such evidence.

Uniformity of decision concerning the *Jones* (supra) issue, in light of the *John W.* (supra) decision and repeal of the MDSO statute, is critical in child molestation cases.

The Fourth District Court of Appeal has also placed reliance on *People v. Bledsoe* (1984) 36 Cal.3d 236 [203 Cal.Rptr. 450, 681 P.2d 291] for the proposition that admission of evidence such as that offered by Defendant herein, medical/psychiatric expert testimony that Defendant was not suffering from a mental defect, disease or condition known as pedophilia, must be conditioned on a prior showing that the basis of said opinion and the expert meet the so-called *Kelly-Frye* standards. Defendant contends this is a mistaken application of *Kelly-Frye* and that it raises important questions of law of first impression. Since the *Kelly-Frye* line of cases in California had not been decided prior to *Jones*, it also obviously impacts the continuing viability of the *Jones* decision in the wake of *Kelly-Frye*. Resolution of this issue is therefore important to assure uniformity of decision in this state as to the admissibility in child molest prosecutions of such evidence as was held admissible in *Jones* (supra) and inadmissible herein.

Historically, the *Kelly-Frye* Rule has been applied to determine the admissibility of such things as fingerprint, polygraph, blood tests and voice print evidence. *People v. Bledsoe* (supra). The *Kelly-Frye* Rule devolved from two cases, *People v. Frye* (D.C. Cir. 1923) 293 F. 1013 and *People v. Kelly* (1976) 17 Cal.3d 24 [130 Cal.Rptr. 144; 549 P.2d 1240]. Each dealt with the admissibility of expert testimony based upon the application of a new scientific technique but *not* applied to medical testimony. In *Kelly* the court held that the admissibility of expert testimony based upon the application of a new scientific technique traditionally involved the process of first establishing the reliability of the method, usually by expert testimony, and then presenting a witness who is properly qualified as an expert to give an opinion on the subject, with the proponent required to show that correct scientific procedures were used. The Court also held a

preliminary showing of general acceptance of the new technique in the relevant scientific community is required when the evidence is based on a new or novel scientific technique.

The *Kelly-Frye* Rule basically tests the reliability of scientific techniques which are new to the judicial system. The Court of Appeal has applied the *Kelly-Frye* Rule to uphold the lower court's decision to exclude the medical/psychiatric testimony herein. The excluded testimony did not deal with nor relate to any new scientific technique but rather only with medical/psychiatric matters, and Defendant contended, therefore, the *Kelly-Frye* Rule should not have been applied.

The medical condition of a person as the subject of medical/psychiatric testimony as in *Jones* (supra), and herein, Defendant contends is materially distinguishable from the testimony of a psychologist in *John W.* (supra) and a rape trauma counselor in *Bledsoe* (supra). In each of these cases admissibility of new and novel scientific evidence was involved. In *Jones* (supra), and herein, the medical testimony of a neurologist/psychiatrist was at issue as to whether the Defendant suffered from a medical condition, disease, or defect known as pedophilia. Presumably a medical doctor's opinion is based upon his experience, education and knowledge gleaned from the treatment and evaluation of patients with this condition and not dependent on some new and novel scientific technique. Are all medical opinions now to be subject to *Kelly-Frye* standards? This is an important question of law.

The Court of Appeal in relying on *Bledsoe* (supra) found that Defendant offered Dr. Anderson's testimony herein in order to prove the alleged molestation did not occur and concluded that, just and [*sic*] *Bledsoe* (supra) required rape trauma syndrome to be subject to *Kelly-Frye* standards before such testimony could be used to

show a rape had occurred, Dr. Anderson's testimony was also subject to said standards to prove a child molest had not occurred. Defendant offered the proffered testimony as character evidence only to show Defendant was not suffering from a mental condition, defect or disease predisposing him to molest children to allow the jury to conclude if they so desired that he was less likely to have committed the alleged child molest since he did not suffer from such condition, defect or disease. These were the same exact reasons stated in *Jones* (supra). It appears, in not following *Jones* (supra) and relying on *Bledsoe* (supra), the Appellate Court has exceded [*sic*] it's [*sic*] jurisdiction.

II.

IS THE *KELLY-FRYE* RULE APPLICABLE TO NON-MEDICAL EXPERT TESTIMONY CONCERNING THE EXISTENCE AND FEATURES OF THE SO-CALLED VICTIM ABUSE SYNDROME?

The Court of Appeal upheld the trial court's admission of the testimony of Craig Rath, a psychologist, which dealt with a relatively new scientific technique, the identification of a pattern of behavior allegedly associated with sexual child abuse victims, known as a child molest victim syndrome revealed through sociologically observed patterns in reporting the molest incidents. The trial court did not apply *Kelly-Frye* evidentiary standards applicable to new and novel scientific techniques and the appellate court inappropriately upheld it's [*sic*] admission. Craig Rath's non-medical testimony was based on a new scientific

* * *